



Janice K. Brewer
Governor

State Of Arizona Board of Podiatry Examiners

"Protecting the Public's Health"

1400 W. Washington, Ste. 230, Phoenix, AZ 85007; (602) 542-3095; Fax: 542-3093

Barry Kaplan, DPM; Joseph Leonetti, DPM; Barbara Campbell, DPM;
M. Elizabeth Miles, Public Member; John Rhodes, Public Member; Sarah Penttinen, Executive Director

BOARD MEETING MINUTES

March 13, 2013; 8:30 a.m.
1400 West Washington St., B1
Phoenix, AZ 85007

Board Members: Joseph Leonetti, D.P.M, President
Barry Kaplan, D.P.M., Member
Barbara Campbell, D.P.M., Member
M. Elizabeth Miles, Secretary-Treasurer
John Rhodes, Public Member

Staff: Sarah Penttinen, Executive Director

Assistant Attorney General: John Tellier

I. Call to Order

Dr. Leonetti called the meeting to order at 8:32 AM.

II. Roll Call

Dr. Leonetti noted for the record that all Board members were present as well as Ms. Penttinen and Mr. Tellier.

III. Approval of Minutes

a. February 13, 2013 Regular Session Minutes.

MOTION: Dr. Kaplan moved to approve the minutes. Ms. Miles seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. February 13, 2013 Executive Session Minutes.

Ms. Miles noted that she would like to make an amendment to the minutes as drafted.

MOTION: Dr. Kaplan moved to go into Executive Session for the purpose of reviewing confidential documents. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the Board adjourned into Executive Session at 8:34 AM.

The Board returned to Regular Session at 8:35 AM.

MOTION: Dr. Kaplan moved to approve the minutes with the amendment offered by Ms. Miles. Mr. Rhodes seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

IV. Review, Discussion and Possible Action –Review of Complaints

a. 12-21-C – Kevin O'Brien, DPM: Failure or refusal to provide patient records within 21 days of receipt of request and authorization to release.

Dr. O'Brien was not present. Ms. Penttinen was the investigator for the case and provided the following summary: A complaint against Dr. O'Brien was received from Dr. Ronald Killian alleging that Dr. O'Brien has failed to provide patient records within the legally required timeframe for three separate patients, J.T., K.B., and D.D. With regard to the patient J.T., Dr. Killian stated he originally requested the patient's records from Dr. O'Brien on June 1, 2010 but did not receive them until August 24, 2012. Dr. Killian stated his office sent other requests during that time period but the requests were not documented by his staff. For patient K.B., Dr. Killian stated he sent seven requests to Dr. O'Brien between April 17 and June 26, 2012; the records were received on August 24, 2012. And for patient D.D., Dr. Killian stated he requested records on August 15, 2012 but had not received them as of the date of his complaint which was August 28, 2012.

Ms. Penttinen continued: When Dr. O'Brien responded to the complaint he provided complete copies of the charts for each of these three patients. In his written response to the complaint Dr. O'Brien stated that he received a records request for patient J.T. on June 1, 2010 and send the records via fax on June 21, 2010. He stated he did not receive any notification that the records had not been received, but he received another records request in August of 2012. In review the chart Ms. Penttinen found that Dr. O'Brien's chart only shows one request for the records which was received on June 12, 2008 and a note that the records were faxed back on that date. For patient K.B., Dr. O'Brien stated he received a records request on May second 2012 but there was no date of birth listed for the patient. Dr. O'Brien's staff also determined that they did not have a patient with that particular name. In August 2012 Dr. Killian's office contacted Dr. O'Brien's staff again regarding the records requested it was at that time that Dr. O'Brien staff learned the patient had a name change since the last time she was seen as a patient by Dr. O'Brien. The correct name and date of birth were provided in a records request sent on August 16, 2012 and the records were sent on August 24. With regard to patient D.D., Dr. O'Brien stated he received a records request from Dr. Killian's Parker, Arizona office on October 24, 2011 and the records were faxed back to that office on October 31. A second request was received from Dr. Killian's Parker office on June 26, 2012 and records were faxed back to that office on the same day. A third request was received on August 16, 2012 from Dr. Killian's office in Lake Havasu City. Dr. O'Brien claims that his staff was told by Dr. Killian's office that there is sometimes confusion transporting records between the two offices. Ms. Penttinen also advised that she contacted Dr. Killian's office to confirm whether or not the records for this patient had been received. She was told by Dr. Killian's staff that the patient's records were scanned into their electronic medical record system on August 15, 2012.

In conclusion Ms. Penttinen stated that with regard to the first two patients she does not feel that there was enough information or documentation supplied by Dr. Killian to affirmatively substantiate the allegations. With regard to the third patient Ms. Penttinen finds that the allegation is clearly unsubstantiated. Dr. Kaplan stated that he finds no violations in this case but he believes this may be more of a personality conflict between these two physicians. Dr. Leonetti agreed with Dr. Kaplan but also stated that he believes Dr. O'Brien is aware that Dr. Killian needs medical records and could be more timely in providing them. Dr. Leonetti stated that, although the board is not an advisory board, he would strongly encourage both Dr. Killian and Dr. O'Brien to utilize some type of third-party verification to document when records requests are sent and/or received and when records have been sent back in return. Ms. Miles stated her opinion that the allegations in this particular case aren't substantively proven, but she does feel that there is cause for some concern. She suggested making specific mention in the minutes for this meeting regarding any concerns the board may have and forward a copy of the minutes to both physicians, if it would be appropriate for the board to do so. Mr. Tellier advised that would be permissible. Ms. Miles also suggested that the doctors use better communication skills with one another and improve their documentation regarding records requests. Dr. Leonetti agreed as did the other board members.

MOTION: Ms. Miles moved to dismiss this case with a statement in the minutes regarding the Board's concerns as discussed. Dr. Campbell seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote.

b. 13-05-B – Kathleen Stone, DPM: Use of controlled substances for other than accepted therapeutic purposes; practicing podiatry under the name of another podiatrist.

Dr. Stone was present with attorney Bruce Crawford. Ms. Penttinen was the investigator for this case and provided the Board members with her investigative findings prior to the meeting. Dr. Leonetti noted that this complaint case was generated by a notification from DEA regarding their investigation of medication orders and prescriptions for Dr. Stone. Dr. Stone and Mr. Crawford addressed the Board and advised that Dr. Stone has already seen Dr. Michel Sucher for a substance abuse evaluation. The Board is in receipt of Dr. Sucher's evaluation report. Dr. Stone admitted that she had been ordering the medications Ambien and Soma through a pharmaceutical company for her own personal use and that she had used the DEA registration number of her practice partner to call in prescriptions for herself. Ms. Penttinen had assembled an index of medication doses and quantities, and it was noted for the record that Dr. Stone's use of these medications was at therapeutic or sub-therapeutic levels. Dr. Stone also did have valid prescriptions for the medications at one time in the past.

Mr. Crawford indicated that he anticipated a disciplinary agreement for Dr. Stone and the doctor plans to retain the services of Dr. Sucher for ongoing treatment and monitoring. Ms. Penttinen noted that in her discussions with Dr. Stone, Dr. Stone was very forthcoming and cooperative. Ms. Penttinen also advised that she had been in touch with DEA and because Dr. Stone surrendered her registration with them they do not intend to pursue any further action. It was confirmed that Dr. Stone's practice partner did not have any knowledge of Dr. Stone using her DEA number to call in prescriptions; however, at this time the partner and all office staff are aware of all circumstances related to this event. Dr. Stone stated that if a patient of hers requires a prescription for any type of controlled substance that patient will be permanently transferred to the care of Dr. Stone's partner. Mr. Crawford and Dr. Stone confirmed that they were in agreement with the recommendations made by Dr. Sucher. Ms. Penttinen clarified for the Board that in her preliminary investigation report she had included [A.R.S. §32-954.01] paragraph 20; however, she feels that potential violation does not apply as there was no issue of patient safety involved in this case. Dr. Stone confirmed that she has never used any prescription medications while treating patients and that the medical treatment she is now receiving from her physicians is helping to alleviate her medical issues.

Dr. Leonetti stated he was in agreement with the recommendations in Dr. Sucher's report with the exception of a CME course on prescribing. He stated he was in favor of offering Dr. Stone a Consent Agreement. There was discussion among the Board members and Ms. Penttinen regarding the specific terms of such an Agreement with the conclusion as moved below:

MOTION: Ms. Miles moved to offer Dr. Stone a Consent Agreement with the following terms: Two (2) years of probation; obtain one healthcare provider to oversee and prescribed any controlled substances needed for a lawful course of treatment; abstain from all alcohol and any unauthorized medications; obtain a counselor within thirty (30) days of the effective date of the agreement and maintain counseling as long as recommended by the counselor, and make reasonable efforts to have the counselor provide quarterly progress reports to the Board; enroll in a Board-approved random drug testing program within thirty (30) days of the effective date of the agreement with testing no less than once per month; complete a thirty-six (36) hour course in alcohol and substance abuse education; complete all necessary release-of-information forms for all healthcare providers herein to release information to the Board; be available for interviews with the Board upon reasonable notice; Dr. Stone would bear all costs of the agreement; and the effective date of the agreement would be retro-active to today's date. Ms. Miles also moved to include in the consent agreement Findings that in this case there was no finding of danger to public health, safety or welfare. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously.

/

V. Review, Discussion and Possible Action – Probation / Disciplinary Matters

a. 08-44-C – Alex Bui, DPM: Monthly update.

Dr. Leonetti reviewed the status updates provided by Dr. Bui received on February 14 and March 4, 2013 which indicate that Dr. Bui had no charts or records to submit for any durable medical equipment billing for the months of January or February. There was no discussion.

b. 09-17-B – J. David Brown, DPM: Monthly update.

Ms. Penttinen reviewed an e-mail exchange between her and Dr. Michel Sucher regarding Dr. Brown obtaining a pain management evaluation. Dr. Sucher advised Ms. Penttinen in his e-mail response that Dr. Brown was having some type of surgery and would be contacting him after that. Ms. Penttinen stated she will continue to communicate with Dr. Sucher regarding this and contact Dr. Brown directly if necessary. Ms. Penttinen confirmed for Dr. Kaplan that she does not know the type of surgery Dr. Brown was having or when it was to be completed but she will continue to follow-up.

c. 11-21-M – Robert Fridrich, DPM: Monthly update.

Dr. Leonetti reviewed for the other board members that Dr. Fridrich submitted two charts for the month of February involving nail procedures. Dr. Leonetti reviewed the charts and found that the documentation was very good. He noted that Dr. Fridrich has begun using a different type of tourniquet when doing nail procedures which should greatly diminish any chance of a reoccurrence of the tourniquet being left on the toe. There was brief discussion among the physician board members regarding the billing codes used by Dr. Fridrich. The board members agreed that no action would be taken regarding the billing at this time but they will continue to monitor the billing records submitted each month.

VI. Review, Discussion and Possible Action on Administrative Matters

a. Previous complaint 07-11-C against J. David Brown, DPM – status of DEA investigation.

Ms. Penttinen explained to the board members that she spoke with a DEA Diversion Supervisor who told her that they closed their investigation of Dr. Brown in June of 2012 because the U.S. Attorney's Office declined to prosecute. Ms. Penttinen stated she was told that because they declined to prosecute, this board may not use any documents that were submitted by DEA or discuss the content of any of those documents in any board proceedings. This is in contrast to the case of Dr. Kathleen Stone in which DEA submitted documents to the board and stated that they could be used in the board's proceedings. Ms. Penttinen stated she was unable to obtain a more clear explanation of why the documents regarding Dr. Brown could not be used; she was only told that the board could not use them.

Ms. Miles was not familiar with the details of this case. Ms. Penttinen explained that there had been allegations of substance abuse and improper prescribing. DEA had forwarded several of their investigation documents to the board which were placed in the board's investigation file. From DEA's side, the case had changed hands through several U.S. Attorneys. Ms. Penttinen had made several attempts over the last two years to contact the DEA agent in charge of this investigation but was unable to obtain a status update until recently. Ms. Miles asked if the documents specifically state that they are confidential or if Ms. Penttinen had received only a verbal advisory. Ms. Penttinen reviewed the specific documents which state, "This report is the property of the Drug Enforcement Administration. Neither it nor its contents may be disseminated outside the agency to which loaned." Ms. Penttinen added that the Diversion Supervisor is aware of Dr. Brown's current probation.

There was discussion among Ms. Penttinen and the board members regarding the DEA documents which are contained in the board's investigation file as well as interviews which the board had conducted with certain witnesses in 2007 and 2008. There was also discussion about the length of time that has passed since this investigation was initially opened. Ms. Miles asked if the recommendation at this point, due to the variety of factors involved, was to dismiss this case. Ms. Penttinen advised that the board had previously voted to dismiss the case without prejudice with the ability to reopen it at a future date depending on the final outcome of the DEA case; this was simply an update on what that final outcome was. There was brief discussion among the board members regarding the fact that Dr. Brown is currently on probation with substance abuse monitoring. The board members agreed that no further action needs to be taken in this matter.

- b. Discussion regarding investigation of patient complaints filed with the Board which have simultaneous civil malpractice lawsuits pending.

This matter had been placed on the agenda at the request of attorney Bruce Crawford. Ms. Miles stated that she has a concern regarding all board investigation cases, not just those which have malpractice litigation pending. Ms. Miles pointed out that the investigation report is a confidential board document and she does not feel it is necessary to have the investigator read their complete report verbatim in an open board meeting. Dr. Leonetti agreed and stated that the initial discussion by the investigator should be limited only to their opinion regarding whether or not the allegation(s) in the case are substantiated. Ms. Penttinen asked if the board members would like to have the investigators provide a brief summary of the complaint information. Ms. Miles and Dr. Leonetti suggested that it would be appropriate to simply state the allegations and the investigator's findings. Mr. Tellier offered to the board members that it also would be appropriate to have the investigator state for the record during the board meeting which records they reviewed that led them to their conclusion regarding the allegations. Ms. Penttinen asked Mr. Tellier if it would be necessary to state how the complaint originated. Mr. Tellier stated that would not be necessary; the investigator could simply state the allegations in the case. There was agreement among all of the board members that direction would be provided to the investigators that during the board meetings they will provide a summary of the allegations, the records that they reviewed, and their conclusion, but they should not read their complete investigation report word for word.

- c. Discussion regarding podiatrists' use of Groupon advertising and if such constitutes "fee splitting" under the Board's statutes.

Dr. Leonetti reviewed a letter to the editor from Podiatry Management Magazine regarding the use of social media websites such as Groupon for marketing and advertising. Dr. Leonetti stated that two other states have determined that the use of Groupon and similar websites by healthcare professionals constitutes fee splitting. Dr. Leonetti stated that he felt if payment was being made based on a percentage of sales or services he would also consider it fee splitting. Dr. Kaplan agreed and stated that he also feels it constitutes employing a solicitor to obtain business. Mr. Tellier stated that he agreed with both of those interpretations; however, the solicitor aspect may be more of a gray area and would require some investigation. Dr. Kaplan stated he is aware of at least three podiatrists who have been using this type of advertising/marketing and he feels it would be appropriate to ask those doctors to provide a copy of their contracts with those companies. He added that the board's executive director also should obtain contract information independently. There was brief discussion between the board members and Mr. Tellier regarding "flat fee" advertising versus advertising which is paid for with a percentage of total sales.

Ms. Miles stated that with Groupon and similar websites there is a requirement for a person who wishes to obtain those deals to affirmatively sign up or subscribed to that particular website. She feels that this may make a difference when considering whether or not this type of advertising would constitute using a solicitor to obtain business. Ms. Miles also asked if the board would then proceed with opening complaint investigations against podiatrists who are using these types of websites. Dr. Leonetti stated that in order to require the podiatrists to provide a copy of their contracts with these websites he feels the board would have to do that through a complaint investigation process. Ms. Penttinen asked the board members, because this type of social media advertising is so new and evolving so quickly, if they would be interested in taking the approach of sending each of the board's licensees a notification that advertising with these types of sites may be considered fee splitting and would be a violation of unprofessional conduct. Dr. Leonetti stated that he would like to contact the websites and obtain contract term information first.

Dr. Leonetti asked if there were any recommendations on how the board should proceed. Dr. Kaplan stated that he is aware of three specific podiatrists who have used this type of social media advertising. However, he added that he may not have retained the specific advertisement documents that verify that the ads were placed by those three physicians. Dr. Leonetti stated that he feels before any board investigation is open the board must have physical evidence or proof that those specific physicians have used this type of advertising. After brief additional discussion the board members directed Ms. Penttinen to contact the websites Groupon, Living Social and Deal Chicken to obtain information about how they

collect fees for physicians who advertise services or products on those websites. Ms. Penttinen will report back to the board when she gathers that information.

VII. Executive Director's Report – Review, Discussion and Possible Action

a. Open complaint status report.

Ms. Penttinen reviewed the report which indicates that there are currently 54 opened complaints including the two which were on the agenda for today. Ms. Penttinen then stated that after she had printed this report she realized that there are two complaints which were received within the last couple days which she does not see on the current report so the total is actually 56 open complaints at this time. Dr. Campbell asked about case number 11-31-M as she believes that case has already been reviewed by the board. Ms. Penttinen stated she would double check and correct report if necessary.

b. Malpractice case report. (None at this time.)

VIII. Call To The Public

Patient D.A. was present and requested to address the Board regarding the complaint he filed against Dr. Aprajita Nakra. (Complaint case number 11-16-C.) D.A. was advised that he could make any statement he would like but the Board could not make any comment; the only Board action, if any, would be to place his issue on an agenda for discussion at a future Board meeting. D.A. stated he was present when the Board had reviewed his complaint and heard comments from Dr. Nakra's attorney to the effect that the attorney representing him in his civil malpractice case against Dr. Nakra told him to file his complaint with the Board. D.A. stated he only wanted the Board members to know that his complaint was filed independently and not at the prompting of his attorney.

IX. Next Board Meeting Date:

a. April 10, 2013 at 8:30 a.m.

X. Adjournment

MOTION: Dr. Leonetti moved to adjourn the meeting. Dr. Kaplan seconded the motion.

DISCUSSION: There was no discussion on the motion.

VOTE: The motion passed unanimously by voice vote and the meeting was adjourned at 10:17 AM.